



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-16*

FACTS:

You are the former General Counsel of the Massachusetts Department of Environmental Protection (DEP). You were last employed in that position on July 12, 1991. You are now considering submitting a bid for a contract to provide legal services to another state agency.

QUESTIONS:

Given the above facts:

1. will you be barred from appearing before any court or agency of the Commonwealth in connection with any particular matter which was under your official responsibility at DEP for a period of one year after your last employment in your contemplated contract position with another state agency?
2. if you become a special state employee by virtue of your contemplated contract with another state agency, for purposes of the application of §4 of G.L. c. 268A, would the clause limiting the scope of that section by virtue of the number of days of service during the past year apply only to time served as a special state employee?

ANSWER:

1. No, §5(b) of the conflict of interest law prohibits your appearance before any court or agency of the Commonwealth in connection with any particular matter which was under your official responsibility while at DEP for a period of one year from your last employment by DEP, notwithstanding any subsequent services provided to the Commonwealth or one of its agencies.
2. Yes, those provisions of §4 concerning special state employees refer only to service as a special state employee.

DISCUSSION:

Upon the termination of your position with the DEP, you became a former state employee for purposes of G.L. c. 268A. If you are successful in contracting with another agency of the Commonwealth, you will again become a state employee, but most likely, a special state employee.^{1/}

1. Section 5(a)

Section 5(a) prohibits a former state employee from acting as an agent or attorney for or receiving compensation directly or indirectly from anyone other than the Commonwealth in connection with^{2/} any particular matter^{3/} in which the state or a state agency is a party or has a direct and substantial interest and the matter was one in which the employee officially participated.^{4/} Therefore, in regard to matters in which you officially participated as a DEP employee, this section will restrict indefinitely your ability to act as agent or attorney for or receive compensation from anyone other than the Commonwealth.

We note that participation may be found with regard to legal matters which were pending during your DEP employment, where you did not personally handle the matter, but rather, you supervised the work of subordinates. See EC-COI-89-7 (a state employee's participation in discussion or approval of subordinate's recommendation is

more than ministerial in nature); *EC-COI-79-57* (in the case of a state agency general counsel who consulted occasionally with the Office of the Attorney General as well as his agency's legal staff concerning a particular case, that employee's awareness and tacit approval of the work of direct subordinates concerning the case constitutes participation).

2. Section 5(b)

Section 5(b) prohibits a former state employee from personally appearing^{5/} before any court or agency of the Commonwealth within one year after leaving state service in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and if the matter was under the official responsibility^{6/} of the employee within the two years prior to the termination of such state employment.

If, for example, you had official responsibility for several attorneys who made their own litigation decisions (you did not supervise their work) you would still be restricted from personally appearing before any court or state agency for a period of one year in connection with those matters handled completely by your subordinates during your final two years in your DEP position. Such matters were under your official responsibility as general counsel, notwithstanding the fact that you did not participate in them.

Based upon your facts, under §5(b), you may not appear before a court or agency of the Commonwealth until July 12, 1992 in connection with a particular matter which was under your official responsibility between July 12, 1989 and July 12, 1991. This is so because we will interpret the time limits set out in §5(b) to apply to your employment with the DEP, notwithstanding any future contract employment with an agency of the Commonwealth. *See EC-COI-79-8* (§§ 5(a) and 5(b) are not applicable to a contract with another state agency because employee is not receiving compensation from or acting on behalf of anyone other than the Commonwealth); *see also EC-COI-88-12* (former state employee provisions do not apply to one who resigns one state job in order to accept another concerning ability to act in second state position).

3. Section 4

The prohibitions of §4 will apply to you in your contract position as a special state employee. *See EC-COI-82-114*. Section 4 generally prohibits a state employee from receiving compensation from, or acting as attorney or agent for, anyone other than the Commonwealth in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest. *See EC-COI-92-2*. These restrictions apply in a less restrictive manner to special state employees. Accordingly, as a special state employee, you would be prohibited from receiving compensation from, or acting as an agent or attorney for, anyone other than the Commonwealth only in relation to a particular matter which (a) you have participated in as a state employee, (b) is or within one year has been a subject of your official responsibility, or (c) is pending within the state agency in which you are serving. We note that clause (c) is not applicable to a special state employee who serves (in his special state employee position) on no more than sixty days during any period of three hundred and sixty-five days.^{7/}

Your opinion request raises the issue of the simultaneous applicability of the restrictions of §§4 and 5. In *EC-COI-79-2* the Commission advised a former assistant district attorney, who was engaging in private practice and then sought to contract with the district attorney's office as a special district attorney, that he would be subject to the prohibitions of §5(a) and §5(b) with regard to his private practice in light of his previous work as an assistant district attorney. The Commission went on to advise of the applicability of §4 to the attorney as a special state employee in light of his work as a special assistant district attorney, thus implicitly recognizing that the restrictions of §5 continue to operate even as to a current special state employee.

As applied to you as a special state employee, §4 is ambiguous because a literal reading of the statute does not make clear whether the restrictions on your private activities relate to your former state service (at DEP) in addition to your contemplated work as a special state employee (rather than merely from your special state employee work). For example, §4 prohibits a special state employee from receiving compensation from anyone other than the Commonwealth in connection with a particular matter in which the employee has participated as a state employee. However, the statute does not specify that participation "as a state employee" refers to participation only in the current role as a special state employee. We find that the statute should be so construed, although the effect of such an interpretation appears to be of no relevance with regard to your situation. Because of the application of §5(a) to all matters in which you participated as a DEP employee, you are already prohibited under

that section regardless of whether we interpret “as a state employee”, as found in §4, to include matters in which you participated at DEP as opposed to only those matters in which you will participate as a special state employee.

With regard to the provision of §4 which applies to special state employees concerning matters that are or have been under their official responsibility, we will similarly interpret that language in §4 to apply only to matters under the official responsibility of the special state employee. *See EC-COI-79-2*. Therefore, in your case, you will be restricted by §4 as a special state employee from receiving compensation or acting as an agent or attorney for anyone other than the Commonwealth in connection with any particular matter which is or within one year has been under your official responsibility as a special state employee. We remind you, however, that §5(b) will continue to prohibit your appearance before any court or agency of the Commonwealth for a period of one year from the date when you left your DEP position in connection with matters which were under your official responsibility at DEP during your last two years of service at that state agency. However, §5(b) does not restrict your mere receipt of compensation in connection with those DEP matters which were under your official responsibility.

Date Authorized: May 14, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}“Special state employee,” a state employee:

1. who is performing services or holding an office, position, employment or membership for which no compensation is provided, or
2. who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

^{2/}We emphasize the “in connection with” language found in §§5(a) and (b). Compensation and/or representation may be prohibited if sufficiently related to the former state employee’s prior work. We therefore advise that you seek additional advice from us if you contemplate working on a matter which is related to a particular matter in which you participated or which was under your official responsibility while at DEP.

^{3/}“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{4/}“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{5/}The Commission has previously interpreted “personally appearing” to include, in addition to physically appearing before a court or agency of the Commonwealth, contacting an agency or court in person or in writing. *See EC-COI-87-27*.

^{6/}“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

^{7/}Presumably the 60 day limitation found in this portion of §4 applies to state employment in the special state employee position since it modifies clause (c), which refers to particular matters which are pending in the state agency in which the special state employee is serving (emphasis added). Therefore, the 60 days of service must also refer to the employee’s service as a special state employee. In your case, if your contemplated contract employment will be for 60 days or less, then you will not be restricted by §4 concerning matters which are pending in the agency by which you will be employed, but in which you are neither participating as a special state employee, nor are part of your official responsibility in that position.